INDEX OF POINTS.

Cases Cited in Brief of the Respondent.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

GASTON, WILLIAMS & WIGMORE, OF CANADA, LTD., Petitioner,	1921 Term, No. 280.
against	1922 Term, No. 59.
PHILIP A. WARNER, Respondent.	

Statement.

This cause comes before this Court on a writ of certiorari issued to the Circuit Court of Appeals for the Second Circuit to review the affirmance of a judgment in favor of the respondent, plaintiff below, and against the petitioner, defendant below, in a cause of action for breach of contract.

For convenience the parties to the litigation will be referred to as they were in the District Court.

The plaintiff brought this action at law to recover the sum of $11,750.00, balance of a commission earned by the plaintiff as a broker for having procured a contract for the purchase and sale of the SS. "Eskasoni", owned by the defendant. (Complaint, Record p 2.)

The case was tried twice in the District Court for the Southern District of New York, the first

trial resulting in a direction of a verdict for defendant. On appeal to the Circuit Court of Appeals for the Second Circuit the judgment was reversed and a new trial ordered. (261 Fed. Rep., p. 993.) The second trial resulted in a verdict in favor of the plaintiff, and the judgment upon such verdict was thereafter affirmed by the Circuit Court of Appeals for the Second Circuit. (272 Fed. Rep., p. 56.)

The Pleadings.

Plaintiff's complaint contained two causes of action, first, that the defendant agreed with the plaintiff "that if plaintiff should succeed in finding a purchaser for the said SS. "Eskasoni" at the price of $475,000.00, the defendant would pay to the plaintiff the sum of two and one-half per cent. upon such purchase price for his services in the matter." (Record p. 2.) That thereafter the plaintiff procured purchasers of the SS. "Eskasoni" who began negotiations for the same and "thereafter entered into a contract of purchase and charter for the said steamship . . . for the purchase price of $475,000.00." (Record p. 2.)

The second cause of action was for services rendered of the fair and reasonable and agreed value of $11,875.00. The case, however, was tried on the first cause of action and not on the second.

The defendant served an answer to the complaint. After the reversal of the judgment by the Circuit Court of Appeals, and prior to the second trial, the defendant served an amended answer. Therefore no reference is made here to the contents of the original answer.

The amended answer admits the incorporation of the defendant; admits offering the vessel for

sale; admits the making of the contract with the plaintiff; admits the production of the two purchasers, and alleges that the purchasers attempted to enter into the contract referred to. The amended answer denies the second cause of action.

As a separate defense the amended answer sets up §39cc of the British Defense of the Realm Act, which was set forth in the Record p. 8.

The amended answer also alleges that the British Government issued orders to the defendant prohibiting it from chartering or selling the vessel to the proposed purchasers (Record p. 9). The amended answer further sets up a usage or custom in the shipping business of the Port of New York that commissions do not become due and payable except as and when hire is paid by the charterer to the owner.

Facts.

The plaintiff, a citizen of the State of New York, and a resident of the City of New York (Record p. 13) had had business dealings with the defendant (Record p. 14), and in December, 1916, was authorized in writing, by the defendant, to seek a purchaser for the SS. "Eskasoni" (Record p. 14); Plaintiff's Exhibit No. 1, Record p. 56.

The defendant was a foreign corporation, organized and existing under the laws of the Dominion of Canada (Complaint p. 2); (Amended Answer p. 7). The "Eskasoni" was a British screw steamship of St. Johns, Newfoundland, and was owned by the defendant (Record p. 57). The defendant agreed to pay to the plaintiff 2½ per cent. commission for effecting the sale, and after the contract, Plaintiff's Exhibit No. 2, was entered into, paid to the plaintiff $125.00, representing

2½% on the first payment of $5,000.00 (Record p. 16). After the receipt of the letter (Plaintiff's Exhibit No. 1) plaintiff introduced to the defendant Philip Templeman and George Moulton (Record p. 14), and after the introduction, and after discussion between Moulton and Templeman and Gaston, Williams & Wigmore, a contract for the sale of the "Eskasoni" for the price of $475,000 was entered into between the defendant and Moulton and Templeman, and $5,000.00 was paid on account of such contract. (Plaintiff's Exhibit No. 2, Record, p. 56; Record, p. 16). On receipt of this $5,000.00 the defendant paid the plaintiff the said sum of $125.00 (Record p. 16).

It is urged by the defendant that the contract of December 11th, 1916, was but a tentative one, subject to whatever action should be taken by the British Government. The terms of the contract would not indicate that it was tentative in any sense. It is an absolute charter coupled with a Bill of Sale. It provides for the carrying on of the expenses of the vessel by the buyers, and for the buyers' compliance with any laws applicable to the ship. That it was an absolute contract, and never a tentative one, is proved by the letter of the defendant to the Master of the ship, which letter is dated December 12th, 1916. This will be found at p. 62 of the Record, fol. 122 *et seq.*, and in it the owners of the ship tell the Captain that the vessel has been disposed of through the broker's clients, and the letter states:

> "You will observe from the Ninth clause of the Charter party that you are, under the terms of said Charter party, in the employ of the purchasers only".
>
> Record p. 63, fol. 123.

Thereafter the defendant and the proposed purchasers agreed to cancel the contract, and the

proposed purchasers received back the sum of $5,000.00. Record p. 17. Defendant's Exhibit 9, Record p. 65

The defendant contends that this agreement to cancel the contract was reached between the purchasers and the seller because the British Government had refused to permit the purchasers to take title.

Austin, Vice-President of the defendant, was called as a witness to testify:

> "A. I went down to the British Consulate's Office here in New York to ascertain if there was any objection to the transfer being made, or the contract being entered into, to get the approval of the British authorities to the contract.
>
> Q. Did you secure his approval?
>
> A. No.
>
> Q. Did you ask him for his approval?
>
> A. Yes.
>
> Q. And what did he do to that request?
>
> A. Well he said that it could not be approved."
>
> Record pp. 2, 23.

No proof was given by the defendant that the British Government had refused permission to sell to the purchasers produced by the plaintiff. There was an attempt of such proof, but it is contained entirely in the following question put to Mr. Richardson, the British Vice-Consul at New York:

> "Q. Do you recall how this matter came to your attention Mr. Richardson?
>
> A. Well, it is three years ago and I cannot recall all the details, but if my memory serves me right we were approached in the Consulate by Gaston, Williams & Wigmore with a view to ascertaining whether the proposed sale of this vessel with some clients they had in view would be approved."
>
> Record pp. 28, 29.

* * * * * * *

"Q. And what did you do with that request?

A. My recollection is it was intimated to Gaston, Williams & Wigmore that the sale would not be approved."

Record p. 29.

From this it would appear that Gaston, Williams & Wigmore, the sellers of the ship, found it necessary to make application for leave to sell it, and that if there was a refusal that refusal amounted to a defect in the sellers title, and not in the buyers ability to perform. But in whichever light it is taken, we respectfully submit that an intimation is not a refusal, and that the record is silent as to any refusal on the part of the British Government to permit the transfer of the vessel.

Record p. 65.

The arrangement by which the contract was abrogated does not disclose that it was because of any intimation from the British Government. The record shows no proof that it was the act of the British Government and, therefore, on the record before this Court, it appears that the cancellation of the contract was by consent of the seller and the buyer, of which the broker had no knowledge, and that being so the broker is entitled to his commission.

FIRST POINT.

The contract employing Warner as a broker is to be construed by the laws of the State of New York as to its validity, construction and terms.

There are two distinct contracts involved in this litigation, first, the contract of employment

of the broker; and, second, the contract which the broker's customers made with the seller.

The contract of employment of the plaintiff was made in New York City on the 11th day of December, 1916, and is found in the Record as Plaintiff's Exhibit No. 1 at page 56:

"December 11th, 1916.

Mr. P. A. Warner,
30 Church Street,
New York City.

Dear Sir:—

Referring to our conversation this afternoon I beg to advise that you are authorized to offer the steamer "Eskasoni" for sale for four hundred and seventy-five thousand dollars, $475,000.00.

Details as to terms of payment, transfer of steamer, etc., can be talked over when you have purchasers.

Yours very truly,

J. B. Austin, Jr.,
Vice-Pres. & Gen. Mgr.

It will be noted that it does not say what flag the ship "Eskasoni" carried, or whether any particular law should govern the purchasers or the brokers. It is indeed the simplest and most binding form of a broker's contract of employment.

It is suggested by the defendant's counsel that of necessity the plaintiff was bound to take into consideration the law of England when he produced his purchasers, and that law must be read into the contract.

We submit that that is an error, and that the only laws which could be read into that contract were the laws of the State of New York and of the

United States, and that the courts will not read anything else into it. That contract having been made in the City of New York is governed by the laws of the State of New York.

In New York the law of this State

> "is settled by repeated adjudications that the law of the State where a contract is dated, and is to be performed, is to govern as to its construction and validity."
>
> Hildreth *v.* Sheppard, 65 Barber (N. Y.), p. 265, at p. 270.

In the case of a sale of a ship, the contract for which was drawn at New Orleans, although the owner lived in New York, the Court said:

> "It was also argued that this contract was not to be governed by the laws of Louisiana, but by the laws of New York, where the vendors resided. But the contract was made and performed in Louisiana, and must be governed by its laws".
>
> Bulkley *v.* Honold, 19 Howard, p. 390 at p. 392.

Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made.

> Scudder *v.* Union National Bank, 91 U. S., 406, at pp. 411 and 412.
>
> "Contracts are to be governed as to their nature, their validity and their interpretation by the law of the place where they were made unless the contracting parties clearly appear to have had some other law in view".
>
> Liverpool L. & W. Steam Co. *v.* Phoenix Ins. Co., 129 U. S., 397, at p. 453.
>
> "Reasonable intention of the parties to a contract is to be sought in the words of such contract, not assumed, and it is not the duty of the court to bend the meaning of some of

the words of a contract into harmony with the supposed reasonable intention of the parties."

Crimp *v.* McCormick Construction Co., 72 Fed. Rep., 366. Syllabus and at p. 371.

The contract of employment, therefore, having been made in New York is to be construed by the law of the State of New York, and nothing will be written into it implying that any other law than that of the State of New York was in the contemplation of the parties.

SECOND POINT.

The plaintiff fulfilled the entire terms of his contract with the defendant and was entitled to recover the sum of $11,750.00, the balance under said contract.

The record discloses that the plaintiff and the defendant on the 11th day of December, 1916, entered into an agreement in writing, wherein and whereby the defendant employed the plaintiff to sell the SS. "Eskasoni" for the sum of $475,000.00, the details as to terms of payment, transfer of steamer, etc., to be determined when the plaintiff had obtained purchasers. (See Plaintiff's Ex. 1, Record, p. 56).

The making of the contract (Plaintiff's Exhibit No. 2, Record p. 56) is admitted, as is the payment of $5000 by the proposed purchasers, Templeman and Moulton, at the time of the signing of the contract, (Plaintiff's exhibit No. 2, record p. 57) and the record shows that at the time this first payment was made, the defendant

paid to the plaintiff, on account of his services, $125.00, being his 2½% commission on the said first payment of $5000. (Record p. 16).

The case at bar is entirely different from an ordinary case of a broker suing to collect commissions, because in the case at bar the contract which was signed (Plaintiff's Ex. 2) is evidence that there was a meeting of the minds of the buyer and the seller. The record shows that a first payment of $5000.00 was made at the time of the signing of the contract, and that the defendant paid to the plaintiff 2½% of the first payment as the plaintiff's share for having brought the contracting parties together.

It will be borne in mind that the plaintiff in the case at bar is not suing for commissions, but that he is suing for the balance due him under his contract and for the work, labor and services rendered by him.

The plaintiff was not an ordinary broker who was offering a common article of merchandise for sale in a common market. He was employed under a specific contract to sell the SS. "Eskasoni" for the sum of $475,000.00. There were no restrictions as to who the buyer should be, but the contract of his employment definitely stated: "details as to the terms of payment, transfer of steamer, etc. can be talked over when you have the purchasers" (Plaintiff's Ex. No. 1, Record, p. 56).

In accordance with the terms of the contract under which the plaintiff was employed he produced the buyers, and they talked over with the seller the details of the purchase and sale of the steamship, and, after the seller (defendant herein) had negotiated with the buyer, the seller entered into a contract (Plaintiff's Ex. 2, Record, p. 56) wherein and whereby the defendant, as

the seller, accepted the purchasers produced by the plaintiff, signed the contract with such purchasers, accepted such purchasers' money, and paid to the plaintiff his share of the commission on the first payment under the said contract.

It is elementary that where a broker brings the buyer and seller together and they enter into a contract, *for which the broker was employed to act*, that the broker becomes entitled to his commission, provided the contract of sale entered into between the buyer and the seller is on the terms for which the broker was authorized to negotiate the contract.

See 9 Corpus Juris, 595.

In the case at bar Warner was employed to sell the SS. "Eskasoni" for $475,000.00, the details of the transaction to be determined when the purchaser was produced. Warner produced the purchasers and the seller entered into a contract with the purchasers and accepted the purchasers' money. Warner completed the full terms of the contract under which he was employed.

It has been argued, and made the argument in cases such as this, that the broker only becomes entitled to his commission when he finds a purchaser ready, able and willing to buy, but it is submitted that the situation of Warner, the plaintiff in this action, is entirely different from an ordinary broker. Warner's instructions in writing were to find a purchaser for the ship at $475,000.00, the details of the purchase to be determined upon when he found a purchaser, and when the contract (Plaintiff's Ex. 2, Record, p. 56) was entered into between the defendant and Templeton and Moulton the plaintiff's duties were ended.

In other words, the seller accepted the purchaser. Even in cases of general brokerage where the seller accepts a purchaser it has been held that the broker is entitled to his commission.

See Hadley *v.* Schaffer, 177 Ala., 636.

"If such purchaser is accepted by his (the broker's) principal this dispenses with the necessity of showing that the purchaser was ready, able and willing to buy, since acceptance is taken as a conclusive admission of that fact."

Hadley *v.* Schaffer, 177 Ala., 636.

"The plaintiff had performed the services for which he was employed and after his work had been done, the defendants could not relieve themselves of the obligation to pay his earned compensation by exacting further concessions."

Halperin *v.* Schachney, 27 Misc., 195, at p. 198;

Alt *vs.* Doscher, 102 App. Div., 344, affirmed on opinion below, 186 N. Y., 566;

Slocum *vs.* Ostrander, 141 App. Div., 380, affirmed 205 N. Y., 617;

Bauman *vs.* Nevins, 52 App. Div., 290;

Brady *vs.* Foster, 72 App. Div., 416;

Fleet *vs.* Barker, 120 App. Div., 455;

Callister *vs.* Wichern, 147 App. Div., 14.

When through the procurement of a broker, employed to effect an exchange of real estate, a contract for the exchange has been agreed upon and entered into between his customer and the person with whom the exchange was to be effected, in the absence of any express agreement to the contrary the broker is entitled to his commission.

Kalley *v.* Baker, 132 N. Y., p. 1.

"Ordinarily, to earn his commissions a broker must accomplish what he undertook

to do in his contract of employment. Yet, even failing to do so, if he produces a buyer with whom the owner is satisfied, and who contracts with the owner at a price and upon terms satisfactory to the latter, the broker is entitled to compensation."

Colvin *v.* Post Mortgage & Land Co., 225 N. Y., 510, at p. 514.

See also:

Wray *v.* Carpenter, 16 Co., 271.
Wright *v.* Brown, 16 Mo. Ap., 577.
Schlegel *v.* Fuller, 149 Pac. Rpts., 1118.
Bailey *v.* Padgett, 77 So. Rep., 637.
Bunnell *v.* Chapman, 173 A. D., 108, at p. 109.
Sibbald *v.* Bethlehem I. Co., 83 N. Y., 378.
Levy *v.* Ruff, 4 Misc., 180.
Jewett *v.* Emson, 2 Supr. Ct. Rep. (N. Y.) 167.

The contract employing the plaintiff to negotiate the sale was legal where made, and as the defendant placed no restriction upon the person to whom the sale should be made, plaintiff became entitled to the full amount of his commission the minute the defendant entered into a contract with the purchaser produced by plaintiff.

THIRD POINT.

The employment of Warner, as evidenced by Plaintiff's Exhibit No. 1 (Record p. 56) was legal where made.

The contract employing the plaintiff as a broker, Plaintiff's Exhibit No. 1, Record p. 56,

employs him to sell a steamer called the "Eskasoni" at the price of $475,000.00. The details of the terms of payment, transfer of the steamer, etc., to be determined when a purchaser was produced.

It requires no citation of authorities to prove that a simple contract of employment of a broker is legal in the State of New York. The courts will not say that parties entering into such a formal agreement intended to do an illegal act. The presumption is in favor of the legality of the act intended to be done under the contract.

Richards *v.* Wiener Co., 207 N. Y., 65.
Kannengresser *v.* Israelowitz, 107 Misc. 349 at p. 351.
Lorillard *v.* Clyde, 86 N. Y., 384.
Shore *v.* Wilson, 9 Clark & Fin, 397.

The only thing upon which a question might possibly be raised as to the validity of such contract of employment would be the question of the nature of the property intended to be covered by the contractual relations; in this case a ship. The contract in this case does not say the *British ship* "Eskasoni"; it merely says the steamer "Eskasoni". It does not say that the buyers must comply with the British Law. On the contrary, it states that the terms of payment, transfer of steamer, etc., could be talked over when the purchasers were produced. The purchasers were produced and the formal contract was entered into. The authorities cited in Point II of this brief establish that on the signing of the contract between the purchaser and the seller a completed deal was made as far as the broker was concerned.

The subject matter of the contract of employment, a ship, was proper subject matter for such a contract.

A ship is only personal property and can be transferred by possession or by a Bill of Sale. The title to a ship passes the same as any other chattel.

The Active, Fed. Cas. 34 (Olcott 286).
The Amelie, 73 U. S. (6 Wall.) 18.

Nor do the registration acts of the various countries affect the right of the title owner of a ship to pass title to it. The registration acts merely give to a ship certain rights and privileges under the law of the country where she is registered, but the builder and owner of her may convey her, and the property will vest in the purchaser independently of the registration acts. This is true in England as well as in the United States.

Reis & Others *v.* Fairbanks, 21 L. T., 166; 13 C. B. 692; 17 Jn. 918; 22 L. J. C. P. 206.

Pritchard's Digest of the Law and Practice in the High Court of Admiralty of England, 56, p. 593.

"In England and the United States the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise."

The Benito Estanger, 176 U. S. 568, at p. 578.

To make a Bill of Sale valid it need not be filed in the Custom House.

Hozey *v.* Buchanan, 41 U. S. (16 Pet.) 213.

The law requiring the register to be inserted in the Bill of Sale on transfer of a ship refers mere-

ly to her character and privileges as an American ship.

The Amelie, 73 U. S. (6 Wall.) 18.

The registration of vessels is not compulsory on their owners; it being a privilege and advantage of which they may, or may not, avail themselves as they choose.

Davidson *v.* Gorham, 6 Cal. 343.

If a registered vessel is assigned to a foreigner she is only deprived of her American character.

Philips *v.* Ledley, Fed. Cas. 11096 (1 Wash. C. C. 226).

A change of registry is not necessary in the sale of a ship to transfer the property in it, the effect of not obtaining a new registry being merely that the ship loses the privilege of an American bottom.

Hatch *v.* Smith, 5 Mass. 42.

FOURTH POINT.

The statutes of Great Britain, known as the British Defense of the Realms Act, are penal in their nature and have no force in the United States.

The defendant attempted on the trial to prove the English law by a lawyer who had been a member of the American Bar since 1882, and who had been a British Barrister before coming to the United States.

(Record, p. 31.)

The plaintiff contends that this witness was not qualified, and that his testimony was improperly heard.

(Record, p. 33.)

This witness attempted to show that by the British Defense of the Realms Act the contract for the purchase and sale of the "Eskasoni" was invalid as against the public policy of England, that it contained very strong penalties, and that in England it could not be enforced;

(Record, p. 33.)

and the witness cited the case of the Anglo-Russian Merchant Traders *vs.* Batt & Co., 2 King's Bench, 269. The witness did not anywhere testify that the British Courts had ruled against the particular sections of the British Defense of the Realms Act relating to the sale and transfer of ships, but merely testified that as to a great many of these regulations no civil right could spring from such a contract.

(Record, p. 33.)

Nowhere in his testimony was he asked, or did he state, that a broker employed to find a purchaser for a British ship would come in under the Defense of the Realms Regulations, or that his contract of employment was invalid, or that the broker could not recover. Consequently it is left to the Court to construe the Defense of the Realms Regulations and determine whether or not those Regulations excluded the plaintiff from the right to recover for the services rendered by him.

a. It has been held since time immemorial that the penal laws of a foreign jurisdiction cannot be enforced in another jurisdiction.

Story on Conflict of Laws, 7th Ed. Ch. 2, Sections 18, 19.

"Another maxim or proposition is that no State or Nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein."

Story on Conflict of Laws, 7th Ed. Ch. 2, §20.

b. The Defense of the Realms Regulations are penal in their nature and cannot be enforced in this jurisdiction.

"I think the Supreme Court in 127 U. S. (Wisconsin *v.* Pelican Inc. Co., 127 U. S. 265) meant to confine the operation of the rule that no country will execute the penal laws of another to such laws as are properly classed as criminal."

Huntington *v.* Attral, 146 U. S., 657, at p. 665.

Mr. Justice Gray, in Huntington *v.* Attral, *supra*, entered into a very full discussion of what were penal laws, and what were not penal laws, and summed up the whole subject in the following sentences:

"All breaches of duty that confer no rights upon individuals or persons and which the State alone can take cognizance of are in their nature criminal, and that all such come within the rule."

Huntington *v.* Attral, 146 U. S., p. 657, at p. 665.

"The test whether a law is penal, in a strict and primary sense is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual."

Huntington *v.* Attral, 146 U. S., p. 657, at p. 668.

"The courts of no country execute the penal law of another."

The Antelope, 23 U. S. (10 Wheaton), p. 66, at p. 123.

"It is well settled, and is not denied by plaintiff's counsel, that the penal laws of one State can have no operation in another. They are strictly local and affect nothing more than they can reach."

Flash *v.* Conn, 109 U. S., 371, at pp. 376, 377.

See also,

Wisconsin *v.* Pelican Ins. Co., 127 U. S., p. 265, at p. 290.

Northern Pac. Ry. Co. *v.* Babcock, 154 U. S. 190, at p. 198.

Texas & Pacific Ry. Co. *v.* Cox, 145 U. S., p. 593, at p. 604.

Brady *v.* Daly, 175 U. S., p. 148, at p. 155.

Schick *v.* U. S., 195 U. S., p. 65, at p. 77.

The witness cited, in support of the conclusions stated by him, the case of the Anglo-Russian Merchant Traders, Ltd. *v.* John Batt & Co., Ltd., 2 King's Bench, p. 679.

We submit that the case cited is not in point. In that case both of the parties to the contract out of which the suit arose were citizens of Great Britain; they were within the jurisdiction of Great Britain; the property which was the subject matter of the contract was within the jurisdiction of Great Britain, and the law was a British law known to both of the parties to the contract, and they made the contract knowing of the existence of the law. See report of Arbitrator, 2 King's Bench, p. 679, at p. 681.

The suit was brought for the breach of the contract because the seller failed to deliver and ship

something which had been prohibited by law from being shipped, and the Court sustained the seller in its defense that owing to existing regulations it could not be compelled to carry out the contract, because the carrying out of the contract would have been a violation of law.

That is not the situation here. Warner, an American citizen, entered into a valid contract to render his services as broker, and performed his services. It must be presumed that the contract of employment of Warner was for employment in a legal venture. Illegality cannot be presumed. There was nothing in the law of the United States, or of the State of New York, the place where the contract of employment was entered into, which made such employment illegal and, consequently, the decision quoted by the expert witness has no application in this jurisdiction. That decision is in line with what this Court had already held in the case of Keveny *v.* McCormick & Co., 266 Fed. Rep. P. 314 at p. 315, where this Court said:

> "Although nothing was said upon this subject in the contract the statute is written into it as a part of the law of the land where the contract was made and to be executed."

So, in the case at bar, the contract employing Warner to render his services was made in New York; the contract on Warner's part was to be executed, and was executed, by him in the State of New York; the subject matter of Warner's duty under the contract was the rendition of his own personal services, so that all of the elements of his contract of employment were within the jurisdiction where the contract was made, and the law of that place, to wit, the law of the United States and of the State of New York, applies to the contract to the exclusion of the law of the foreign country.

The second case cited by the expert witness was that of Metropolitan Water Board *v.* Dick, Kerr & Co., 2 King's Bench Division p. 1. That likewise has no application to the case at bar. That was a case where for war time necessities work under a public contract of construction was suspended under the Defense of the Realm Regulations. Again both of the parties of the subject matter were subject to the jurisdiction of the British Courts, and both of the parties were aware of the law.

In the case at bar the witness Warner did not know of the bunkering agreement, or of the British law, or that Moulton and Templeman might be unsatisfactory to the British Authorities.

Record pp. 18 and 19.

FIFTH POINT.

The defendant did not prove the refusal of the Shipping Comptroller to consent to the sale of the ship.

The defendant attempted to prove by the witness Austin that, after the contract for the sale of the "Eskasoni" had been signed, the British Government objected to the sale. It will be noticed that the Defense of the Realms Regulations are that the Shipping Comptroller must give the consent. The testimony of Austin is to the effect that he went to the British Consul's office and saw the Assistant Consul, Mr. Richardson, who said that the sale would not be approved.

Record pp. 21 and 22.

Mr. Richardson, when called as a witness for the defendant, testified as follows:

"My recollection is it was intimated to Gaston, Williams & Wigmore that the sale would not be approved."

Record p. 29.

Austin further testified that the ship did not get here until July, 1917, Record p. 28, so that the very terms of the contract, Plaintiff's Exhibit 2, could have been enforced any time up until July. By Defendant's Exhibit A it will be seen that the contract was cancelled by mutual consent (Defendant's Exhibit A, p. 65), and it will be noticed from Austin's testimony that there was an agreement between Austin and Moulton and Templeman when they agreed to accept back the check for the first payment that Moulton and Templeman could buy the boat at a later date.

Record p. 26.

We respectfully insist that the evidence on the part of the defendant, seeking to show that the British Authorities objected to the sale, is not sufficient, and that the defendant has failed in its proof.

SIXTH POINT.

The failure to obtain the consent of the British Authorities to the sale of the "Eskasoni" was a failure of the defendant because of a defect in its title.

The defendant was subject to the British Bunkering Agreement and could not sell the ship until it obtained the consent of the British Government.

The witness Austin testified:

"We were anxious to sell them the boat or we would not have worked on it all that time. When the time came to make the first move we were confronted by an obstacle which we could not get over, namely, the lack of the approval of the British Authorities, our Company being a subscriber, among others, to the British Bunkering Agreement. When we found that we could not get over that we told them what the circumstances were, and, having other things to do, I dropped the case and worked with other business."

Record p. 48.

And he further testified (Record pp. 25 and 26) that he went to the British Consul to get approval of the sale. (Record, p. 21). Mr. Richardson, the British Vice-Consul, testified that Gaston, Williams & Wigmore approached him "with a view to ascertaining whether the proposed sale of this vessel with some clients they had in view would be approved." (Record, p. 29).

It will be seen from the foregoing references to the testimony that the defendant first accepted the purchasers found by the plaintiff and entered into a contract in writing and accepted the first payment on said contract, paid the plaintiff on account of his services, and then applied to the Government of which it was a citizen for permission to carry out the terms of the contract. If there had been a definite refusal of permission, and if the defendant had proved this definite refusal, nevertheless the failure of the defendant to obtain the permission of the Ship Comptroller of Great Britain was a defect in the defendant's own title, and this defect cannot rob the plaintiff of his right to his commission.

The situation is identical with the failure of title in a real estate transaction, and the reported

cases in real estate matters are directly in line and controlling in such a situation.

Smith *v.* Peyrot, 201 N. Y. 210, at p. 214.
Tieck *v.* McKenna, 115 A. D. 704, and cases cited.
King *v.* Knowles, 122 A. D. 414.
Reis Co. *v.* Zimmerli, 224 N. Y. 351.
Cusack *v.* Ackman, 93 A. D. 579.
Dorlon *v.* Forrest, 101 A. D. 32.
Kalley *v.* Baker, 132 N. Y. 1 at p. 5.

"In Knapp *v.* Wallace, 41 N. Y. 477, the defendant employed a broker to purchase certain real estate for the price named, agreeing to pay him one per cent. on that price for his services. * * * As a defense to an action brought to recover the commissions defendant sought to show that the title of the vendor was defective, and for that reason was unable to perform his contract. It was held that 'it was no defense to the plaintiff's claim that the title to the property was defective. Mossmore (the broker) had not undertaken that it should be good. The contract between him and the defendant did not place his right to compensation on such a condition.' "

Kalley *v.* Baker, 132 N. Y. 1 at p. 5.

SEVENTH POINT.

The case of Keeveny vs. McCormick, 266 Fed. Rep. 314, is not in point.

The Keeveny case, heretofore decided by this Court, was a case where Keeveny, an American citizen, and employe of the defendant, a corporation organized under the laws of California, sued to recover commission for effecting a sale of an

American ship. A contract was signed and a payment made in escrow, to be paid on delivery of a Bill of sale. The United States Shipping Board refused to grant permission for the sale, and the contract was never consummated. In the Keeveny case, however, the broker and the seller were American citizens. The ship was an American ship, in the jurisdiction of the American Courts. The American citizens were presumed to know the law, or at least their ignorance of it was no excuse, and this Court rightly held that the law necessarily was written in the contract because it was part of the law of the land where the contract was made and was to be executed. But in the case at bar, the law which it is attempted to read into the contract was a foreign law. The place where the contract was made was in a foreign jurisdiction from that of the law relied on. The broker in the case was not an employe of either of the parties, prior to the single transaction in suit. The broker was an American citizen. The contract of his employment was made in America, and was a valid contract where made, and the contract itself, as reference to it will disclose, was intended to be carried out in the jurisdiction of the State of New York, and not within the jurisdiction of the country whose law is relied upon.

The test to be applied is whether the contract of employment was legal where made and where it was to be carried out. Warner's contract of employment was legal in the State of New York where he was to execute it, and the mere fact that the British subjects themselves could not validly enter into or carry out the contract of sale, owing to their allegiance to Great Britain, does not deprive Warner of his right to recover.

The objection that the contract is void as against public policy can only be sustained in the jurisdiction whose law it is claimed it contravenes:

> "This court has several times held that such an action as this, involving the validity of such a contract upon grounds of public policy, is not a Federal question, but one for the exclusive jurisdiction of our own courts".
>
> Beck *v.* Bowman, 187 A. D., p. 774, at p. 783, and cases cited.

Care must be taken not to confuse the contract for the sale of the ship with the contract of employment made with Warner. The British statute referred to does not cover the employment of the broker, nor could it apply to Warner's contract of employment in this jurisdiction, even if it did specifically refer to it.

In the case of Irwin against Williar, 110 U. S. 499, the question of the legality of the contract under which the broker claimed his commissions was raised and discussed very thoroughly by the Court. The Court said at page 510, referring to an illegal contract:

> "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it, which renders it void, and in such a case being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances."
>
> Irwin *v.* Williar, 110 U. S. 499, at p. 510.

It is respectfully submitted that in the case at bar the contract entered into between the plaintiff and the defendant in the City of New York, on the 11th day of December, 1916 (Plaintiff's Ex. 1, Record p. 56), followed out, as it was, by the sign-

ing of the contract (Plaintiff's Ex. 2, Record pp. 56 and 57) and by the payment to the plaintiff of a portion of his commission on account, was valid and enforceable irrespective of the terms of the British Defense of the Realm Act.

LASTLY.

It is respectfully submitted that the decree of the Court below should be affirmed.

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Counsel.